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No. 06-1322

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SUPREME COURT, U.S.

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, in ruling that Respondent Kennedy's Dec., 2001 filings were a charge under the ADEA , properly relied in part upon the lawful procedural regulation of the EEOC, 29 C.F. R. 1626, which provides that the first writing by a potential plaintiff to the EEOC that identifies the employer and generally alleges the discriminatory acts of the discrimination is sufficient to constitute a "charge"?

2. Whether the Second Circuit erred in ruling, contrary to the decision in *Bost et al v. Federal Express Corporation,* 372 F.3d 1233, (11th Cir. 2004), that a charging party should not be denied the right to bring suit to enforce the ADEA because of a failure of EEOC to perform its statutory duty to "promptly notify " the employer or other respondent of the filing of the charge ?

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No. 06-1322

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW AND JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit reversing the district court's order granting a motion to dismiss the claims of the fourteen Plaintiffs-Respondents is published as 449 F.3d 558 and is reprinted in the Appendix to the Petition at 3a-23a. A timely motion for reconsideration was denied by that Court on October 31, 2006. 1a-2a. Plaintiffs-Respondents agree that the Petition was timely filed, and that this Court has jurisdiction to grant or deny the Petition. Pet. 1. The Memorandum and Order of the District Court dated October 9,2002 is not reported officially, but is reprinted at Pet. App. 31a-42a.

STATUTE AND REGULATION INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.(the "ADEA"). The provisions of that Act are set forth in the Appendix to the Petition, ("Pet. App.") 62a-68a. Under the heading Statute and Regulations Involved, the Petition refers to the ADEA, but does not cite the applicable Regulation of the United States Equal Employment Opportunity Commission (hereafter "EEOC"or "the Commission"), 29 C. F.R. 1626 or any other regulation. The relevant provisions of Regulation are however set forth at Pet. App. 68a-70a.

STATEMENT

1. The Underlying Facts. Petitioner Federal Express Corporation ("Federal Express") is engaged in the transportation of letters and other small packages by air and ground throughout the United States for next day delivery. Its "couriers" wear a purple uniform and drive small trucks with

"FedEx" logos on them from several hundred stations and make deliveries to, and pick-ups from, businesses and residences near their station. See the Complaint, R. 1.[1] Petitioner has employed approximately 29,000 or 30,000 couriers at the end of each year from 2001 through 2006. Petitioner employed the fourteen (14) Respondents as "couriers" in New York, California, Florida, Illinois, Michigan, and New Jersey.

Each of the fourteen Respondents was over the age of 40 and was employed by Federal Express as a courier and had more than 10 years of service with Petitioner Federal Express when the alleged age discriminatory conduct by Petitioner harmed him or her. R 1 and Pet. App. 32a-33a. The Complaint alleges that Federal Express "was placed on notice of the allegations that it was discriminating on the basis of age against couriers over the age of 40" no later than May 1995 and that "Some of the plaintiffs in this case timely notified the EEOC of the discriminatory practices by Federal Express more than 60 days before this date." R 1, Complaint para. 29.

2. The Applicable Regulation. The procedural Regulation of the EEOC under the ADEA states that a "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)," 29 C.F.R. 1626.6." See App. B, 14a. The Regulation also states that "...a charge is sufficient when the Commission receives from the person making the charge a written statement or information reduced to writing by the Commission that conforms to the requirements of 29 C. F.R. 1626." 29 C.F.R. 1626.8(b). Any failure to comply with the Regulation may be remedied by an amended charge that relates back to the date of the initial writing. 29 C.F.R. 1616.8(b). The procedural Regulation under

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[1] This Brief, like the Petition, will refer to the Docket Entry for document or documents involved. Thus R 1 refers to the Complaint.

the ADEA is substantially identical to EEOC's earlier Regulation under Title VII of the Civil Rights Act of 1964. 29 C.F.R. 1601.12(b), which was adopted many years earlier. See, for example, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 296 (5th Cir. 1968).

3. Administrative Proceedings Before the EEOC. On September 11, 1998, Respondent Plaintiff McQuillan filed a "Charge" (EEOC Form 5) with the Commission. Pet. App. 38a. On Jan. 2, 2001 or earlier, Respondent Robertson filed a charge with the EEOC. Pet. App.21a, n.6.

Respondents McQuillan and Robertson alleged in their formal charges discriminatory conduct by Federal Express occurring in September 1998 and September 2000 respectively. Pet. App. 21a-22a.

On December 3, 2001, Respondent Kennedy filed with the EEOC a completed "Questionnaire and Affidavit"(EEOC Form 283) in which she alleges that Petitioner Federal Express has discriminated against her and other couriers on the grounds of age "via Best Practices Pays," and that Petitioner "targets myself and others" for less favorable treatment than younger couriers. Pet App.43a and fold out A 157. The Best Practices Pays program was planned and used to provide guidance and instructions to managers of couriers and couriers in the United States. The Kennedy Affidavit was notarized on Nov. 3, 2001. Pet. App.151-A. Her fully executed Questionnaire and Affidavit was received by the EEOC on December 3, 2001. See fold-out document A 157. and App. 10a. Respondent Kennedy filed her formal charge with EEOC on May 30, 2001.

4. Proceedings in the District Court. The fourteen Respondents-Plaintiffs including McQuillan, Robertson and Kennedy filed this suit on April 30, 2001, on behalf of themselves and other "similarly situated" couriers. They allege that Respondent Federal Express has engaged and is engaging

in a pattern or practice of age discriminatory policies and conduct against its older couriers beginning in 1995 and continuing to this day, and that the discriminatory practices were and are being carried out throughout the United States.

They seek an order directing that notice be provided to each member of the class of couriers that this case is a collective action under the ADEA, and class certification under Rule 23, Fed. R. Civ. P. under the laws of New York, California, Florida, Illinois, Michigan and New Jersey. Pet. App. E at 36a-37a. They seek prospective and retrospective relief under both the ADEA and the state laws for Petitioner's allegedly age discriminatory practices that harmed them, including back pay, double damages under the ADEA, and the additional relief provided by the laws of those states for age discriminatory conduct.

Petitioner Federal Express did not file an Answer in the district court but filed a motion to dismiss under Rule 12(b)(1) and (6) more than 60 days after the suit was filed. Petitioner asserted that no timely "charge" had been filed by any plaintiff.

In its Motion and Memorandum in Support in the district court, Petitioner failed to cite or discuss the above Regulation. Respondents cited the EEOC Regulation in its memorandum in Opposition to the Motion, but Petitioner also ignored that Regulation in its Reply Memorandum.

By Memorandum and Order, the district court granted the motion to dismiss under Rule 12(b)(6), without leave to replead. Pet App. D, 31a-42a. The district court did so without discussing or citing the applicable Regulation of the EEOC. *Id.*

The district court dismissed the claims of Respondents McQuillan and Robertson as "untimely"on the ground that the suit was filed more than 300 days after "the implementation of" the age discriminatory policies and practices of Federal Express in 1994 or 1995. Pet App. 38a. It ruled that their

claims were "time-barred." Pet 38a. Thus, the district court ruled that those claims were filed too late. *Id.*

With respect to Respondent Kennedy's filings, the district court ruled that "Section 626(d) of the ADEA specifically requires that a 'charge' be filed with the EEOC at least 60 days prior to commencing a civil action. If Congress had intended that an intake questionnaire or Affidavit constituted sufficient notice, it could have specifically stated so. But it did not." App. 39a.

The district court quoted from the decision in *Novitsky v. Am. Consulting Eng'rs,* 196 F. 3d 699, 702 (7th Cir. 1999) to the effect that "[I]t is the charge that matters. Only the charge is sent to the employer....only the charge can effect the process of conciliation." App. 40a.. The district court did not discuss or even cite the procedural Regulation of the EEOC quoted above.

With respect to Petitioner Kennedy's charge, the district court ruled that she should have waited 60 days after her Form 5 charge was filed with EEOC before filing suit. Her Form 5 charge was "untimely since it was filed one month after the current action was filed." Pet App. 39. Its holding is that the Complaint was filed too soon.

In their Motion to Alter or Amend, filed on October 23, 2006, the Respondents cited and relied upon the EEOC regulation, 29 C.F. R. 1626.3, 6 and 8, and the decisions of this Court and the Fourth Circuit in *Edelman v. Lynchburg College,* 535 U.S. 106 (2002) and 300 F.3d 400 (4th Cir. 2002). Respondents argued that under those decisions and the lawful regulation of the EEOC, "the Questionnaire and Affidavit of Patricia Kennedy was a charge in December, 2001, when the EEOC received them." Pet. App. C 25a. On May 4, 2004, the district court denied that motion without stated reason. App. 24a.

5. The Decision of the Second Circuit in this Case.

The Court of Appeals ruled unanimously that the Kennedy Intake Questionnaire and Affidavit of Dec. 3, 2001 was a charge under the ADEA. It noted that the ADEA does not define the word "charge" and that the "interpreting regulations" require only "minimal information", that it only requires that the document "names the employer and generally describes the allegedly discriminatory acts." Pet. App. 14a. In addition, it joined other appellate courts in accepting a "manifest intent rule," when a document received by EEOC is not on Form 5 (a charge), it will be considered a charge "only when the writing demonstrates that an individual seeks to activate the administrative and conciliatory process" of the EEOC. Pet. App. 15a.

With respect to Petitioner Kennedy, the Court of Appeals below ruled that "if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through 'conciliation, conference and persuasion...'" Pet. App. 16a. "Such a holding would establish a prerequisite to suit beyond a prospective plaintiff's control and therefore would be contrary to the spirit and purpose of the Act." Pet. App. 17a, quoting from *Bihler v. The Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983)("'that would convince a reasonable person" that she 'intends to activate the Act's machinery'"; *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 167-68 (2d Cir. 1998); *Edelman v. Lynchburg College*, 300 F.3d 400, 404-405 (4th Cir. 2002). The Court of Appeals stated " Kennedy's questionnaire constituted a 'charge" because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to activate the EEOC's administrative process." Pet. App. 17a..

The Court of Appeals below also ruled that the charges of McQuillan and Robertson were filed within 300 days of the alleged discriminatory conduct against them, and therefore vacated the district court's grant of the Respondent's motion to dismiss their claims, and remanded the case to the district court for further proceedings. Pet App. 21a-22a. Petitioner Federal Express does not seek review of the decision below as to those Respondents. Pet. 4-5.

REASONS FOR DENYING REVIEW

There are and will be further proceedings in the district court on the claims of McQuillan and Robertson and other couriers even if the district court's ruling that Kennedy's claim was "premature" is sustained. See the preceding para. above. Also, it is settled that the timely notice provided to EEOC is sufficient whether or not the charging party is a party to the ensuing law suit. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2nd Cir. 1980).

The valid Regulation of the EEOC provides that a charge "shall be in writing and shall generally allege the discriminatory acts" and "is sufficient when the Commission receives from the person making the charge...a written statement...that conforms to the requirements of 1626.6" 29 C.F. R. 1626.8(b). Pet. App. 14a. The Questionnaire and Affidavit twice signed by Petitioner Kennedy and received by the Commission on Dec. 3, 2001 met those standards, *Id.*, and it also provided all of the information that a charge "should contain." Pet. App. 14a-15a.

The decision below should be sustained on the ground that the EEOC's regulation is lawful and should be effectuated. *Edelman v. Lynchburg College*, 300 Fed. 3d 400, 404-405.(4th Cir. 2002). For by its own terms, the Regulation provides that a writing may be any charge, and when it conforms to all of the

requirements of the Regulation it is a charge, at least in the absence of any conduct or writing by the charging party expressly to the contrary.

1. There Is No Conflict on an Important Matter between the Decision below and the Decisions of other Circuits "on the same important matter" Because Both Courts Applied the Manifest Intent Rule to Different Documents..

There is no conflict between the decision of the Court of Appeals for the Second Circuit below with the decision in *Bost et al. v. Federal Express Corporation,* 372 F. 3d 1233 (11th Cir. 2004) on the "same important matter." Rule 10 of this Court.

For the Second Circuit below, like the Eleventh Circuit in *Bost, supra,* applied the "manifest intent" standard or "test" for determining whether the first document received by the EEOC is a "charge" under the ADEA or Title VII. Pet. 25. Under that standard each court determines whether the charging party has an "intent" to have EEOC notify the employer of its receipt of the writing and/or to have it commence an investigation and efforts at conciliation.

Questions of the intent of a written document in federal court, such as a possible contract, are usually for the district court initially, but review is usually for error of law. The Court of Appeals below ruled that Petitioner Kennedy's fully executed Questionnaire and Affidavit showed her intent to activate the EEOC process, while the Eleventh Circuit ruled that Anthony Bost, who is a courier for Federal Express but not a party to this suit, did not have such an intent. Even while both courts applied the same "manifest intent" standard, a different intent for different persons is unremarkable, particularly if their

writings are different.[2]

The Petition asserts that the decision of the Second Circuit "is in conflict with the decision of another U. S. Court of Appeals on the same important manner." Pet. 14-15, citing S. Ct. Rule 10 On the contrary, the two courts of appeals applied the same analysis, but came to different conclusions about different writings by different employees of Federal Express. Such a difference is not on the "same" matter, and certainly is not on "the same important" matter within the meaning Rule 10.

2. Under the Charge Filing Regulation, Kennedy Could Have Been a Plaintiff in this Suit, even If She had Not filed a Form 5 Formal Charge.

The charge filing Regulation of EEOC is consistent with the purposes of the ADEA. Indeed, the language of that 29 C. F. R. 1626 Pet. App. 69a-70a. That regulation is taken almost verbatim from the Conference Report of the 1978 amendments which incorporated the charge filing features of Title VII into the ADEA. Congress intended to reduce the number of lawsuits that were dismissed because plaintiffs' notice was filed too late. *Id.* And the relation back provision

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[2] Respondent Kennedy signed her Intake Questionnaire twice, once on Dec. 3, 2001 and again two months later on February 3, 2002, suggesting two separate mailings to the EEOC, and some response by EEOC, when it was asked what had happened to her first filing. See, Pet. App. 157. In addition, unlike Bost, Kennedy's Affidavit states "I believe my employer's actions violate my civil rights." Pet. App. 45a; compare Pet. App. for Bost, App. 55. Further, and, as the Second Circuit stated, "...most tellingly, the affidavit unambiguously states '[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers ...." Pet App. 19a. As Petitioner Kennedy apparently understood, EEOC's only vehicle for compelling Federal Express to end the discrimination is a law suit. Courier Bost's affidavit had no comparable statement. Pet. App 55a-60a, see particularly 69a.

set forth in 29 C. F. R. 1626.8(c) is almost identical to that in the older Title VII regulation. 29 C. F. R. 1601.12(b). The Conference Report states: "The conferees intend that 'charge' requirements will be satisfied by the filing of a written statement that identifies the potential defendant and generally describes the action believed to be discriminatory." H. R. Conf. Rep. 95-950 (March 14, 1978) at 8. *Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385, 395 fn.11 Compare 29 C. F. R. 1626.6 and 1626.8(b) at Pet. App. 69a and 70(a).

This Court has recognized that the relation back regulation is lawful and valid. *Edelman v. Lynchburg College*, 535 U. S. 536 (2002).

The EEOC Regulation is lawful and binding upon the parties, and is applicable to letters as well as other informal documents which are not on Form 5. *Edelman v. Lynchburg College*, 300 F.3d 400, 404-405 (4th Cir. 2002). See Pet. at 27. Respondents believe that the decision of the Fourth Circuit is a correct statement of the law. In that case, the Fourth Circuit ruled on remand from the decision of the Supreme Court in *Edelman v. Lynchburg College, supra*, 535 U.S.536."The Code of Federal Regulations provides that 'a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Edelman*, 535 U. S. at ..., n.2, quoting from 29 C. F.R. 1601.12(b), also quoted by the Fourth Circuit in *Edelman*, 300 F.3d at 404. The Code of Federal Regulations has substantially the same language with respect to charges under the ADEA. 29 C. F. R. 1626.3, 1626.6 and 1626.8(b)

In this case three Plaintiffs-Respondents filed charges within 300 days of the last day of harm caused them by the allegedly discriminatory practices of Federal Express. McQuillan, Robertson and Kennedy. Pet. App. 9a-10a, and 21a-22a. McQuillan's charge was filed in 1998, and

Robertson's charge was filed in 2001, and both of them were filed more than 60 days before the filing of this case. Pet. App. 21a-22a.

If the district court had not erroneously dismissed the claims of McQuillan and Robertson, however, Petitioner Kennedy had the right to opt-in to that case under the broad "opt-in" provisions of the ADEA. 29 U.S.C. 626(b) which incorporates 29 U.S.C. 216(b). Under that provision, any employee harmed by the same or similar practice can opt into a suit to enforce the provisions of the Act if the same or similar practices and time frames are involved. "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche, Inc.*, 493 U.S. 165, 170 (1989).

Even if the Kennedy filing of Dec. 3, 2001 was not a charge, therefore, the formal charge she filed on May 30, 2002 related back to Dec. 3, 2001. 29 C.F.R. 1626.8 (c). That formal charge therefore would have cured any defect in the earlier filing, but would be considered filed on Dec. 3, 2001. 29 C.F.R. 1626.8(c); Accord: Rule 15, Fed. R. Civ. The "EEOC's relation-back" regulation is "an unassailable interpretation of" Title VII", or at least "EEOC possessed the authority to promulgate the procedural regulation...the regulation is reasonable and not proscribed by the statute...." *Edelman v. Lynchburg College*, 535 U.S. 106, 115, and 119-20 (2002).

Indeed in that decision this Court " upheld the EEOC regulation" because of the "long history of practice...permitted 'relation back' of a verification missing from the original filing. 535 U. S. at 116. There is no reason that the "relation back of the oath is any less reasonable than the relation back signature" in *Becker v. Montgomery*, 532 U. S. 757 (2001). More recently, this Court has applied the same kind of reasoning to fee applications under the Equal Access to Justice Act. *Scarborough v. Principi, Sec. of VA*, 541 U. S. 401 (2004).

The Petition nowhere cites any evidence that Petitioner was harmed by EEOC's apparent failure to provide it with prompt notice of the filing of the Kennedy Intake Questionnaire and Charge. Petitioner introduced no evidence in the courts below showing any harm caused by EEOC's failure to perform its statutory obligation to provide prompt notice. Yet lack of harm is one factor that this Court can and has taken into account in determining the validity of "relation back" of procedural requirements. *Scarborough v. Principi, Sec. of VA, supra,* 541 U.S. at 403-404.

Under the express language of the EEOC regulation, any subsequent filing by a charging party relates back to the date of the first charge. 29 C. F. R. 1626.8(b). Accord: Rule 15(c); 541 U. S. at 417-418. Even if there had been defects in Kennedy's first filing, they were eliminated by her filing of May, 2002, which related back to Dec. 3, 2001, more than 90 days before this suit was filed on April 30, 2002. *Scarborough v. Principi, Sec. of VA,* 541 U. S. 401 (2004).

3. This Court Should Reject Petitioner's Argument that the EEOC's Failure to Implement its Regulation Should Bar Charging Parties Who Have Provided EEOC with Timely Notice their Right to Bring Suit to Enforce Their Rights.

Any argument that the law should deny a charging party who has filed a timely document with the EEOC advising it of the identity of the parties and the general nature of the alleged discrimination is inconsistent with the purposes of the ADEA and Title VII, and with the Regulation of the EEOC. In *Edelman,* 300 F.3d at 404, the defendant College did not challenge the status of the letter received by EEOC on the grounds of its "substantive contents," but rather "because the EEOC did not assign it an EEOC number, forward a copy to the College or the VCHR." 300 F. 3d at 404. Similarly the Petitioner here also seeks that reversal of the decision below because "Generally...the EEOC does not treat such informal

documents as charges, neither providing notice of them to prospective defendant employers nor beginning investigation and conciliation efforts..." Pet. 9.

As the Fourth Circuit observed, however, "The problems noted by the College are not deficiencies in the charge; they are failures of the EEOC to fulfill its statutory duties...a simple failure by the EEOC to fulfill its statutory duties regarding the charge does not preclude a plaintiff's Title VII claim." 300 F.3d at 404-405. Similarly, in this case, the failures of the EEOC to treat the Kennedy Intake Questionnaire and Affidavit as a charge should not and do not warrant the denial to Plaintiff Kennedy and the other Respondents of the right to prosecute this lawsuit. Accordingly, these cases do not reflect any conflict on "an important federal question." Rule 10(a) Rules of Court. [3]

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[3] Petitioner also argues (at p. 15) that the decision of the Second Circuit below is in conflict with decisions of the Third Circuit in *Bailey v. United Airlines*, 279 F. 3d 194, 199 n.2 (3d Cir. 2002); and with a decision of the Sixth Cir. in *Dunn v. General Motors*, 131 Fed. Appx. 462, 470 n. 7 (6th Cir.2005), However, the issue of the validity of the EEOC Regulation defining a charge was not argued or even mentioned in *Bailey v. United Airlines, supra.* The decision in *Dinn v. General Motors, supra,* was "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION" under Sixth Circuit Rule 28(g); and attorneys in that Court are instructed not to rely upon it in their briefs unless there is no other decision in that Court on the issue involved.. That decision is not considered precedential in the Sixth Circuit, and should not be so considered in this Court. In addition, *Dunn v. General Motors, supra,* did not rely upon or even cite the applicable portions of the EEOC Regulation, 29 C.F. R. 1626.6 and 1628(b).

CONCLUSION

For the Reasons set forth above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted.,

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